

Dee May
Vice President
Federal Regulatory



1300 I Street, NW, Suite 400 West
Washington, DC 20005

Phone 202 515-2529
Fax 202 336-7922
dolores.a.may@verizon.com

August 27, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Regulatory Review Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, CC Docket No. 02-33; and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CC Docket No. 02-52

Dear Ms. Dortch:

This letter responds to AT&T's July 20, 2004 *ex parte*¹ letter from David Lawson, Sidley Austin Brown & Wood LLP, in opposition to Verizon's petition for forbearance from any stand-alone unbundling obligations under section 271. In order to make its argument, AT&T perpetuates inaccuracies about Verizon's filings that ignore the factual record in this docket. In contrast, AT&T has no real response to Verizon's demonstration of harm associated with section 271 unbundling obligations.

AT&T makes the initial argument that in "Verizon's view, *any* costs that Verizon and other Bell Operating Companies might incur to accommodate access to the Bells' 'broadband' facilities are excessive, and therefore forbearance from regulatory obligations requiring such access is necessarily justified to reduce the Bells' costs." AT&T Ex Parte at 1. Of course, Verizon has made no such claim. Rather, Verizon's position is that, consistent with the Commission's finding in the *Triennial Review Order*, forced unbundling of broadband elements is not only unnecessary but would be affirmatively harmful to competition in that it would increase cost, risk and

¹ Letter from David Lawson, Sidley Austin Brown & Wood LLP, to Marlene Dortch, FCC, CC Docket Nos. 01-338 et al., (filed July 20, 2004) ("AT&T Ex Parte").

operational complexity while decreasing efficiency and discouraging investment in and deployment of broadband facilities and services by ILECs and CLECs alike. *Triennial Review Order*, 18 FCC Rcd 16978, ¶ 288 (2003). Accordingly, in support of its petition for forbearance under section 271,² Verizon submitted the declarations of Jerry Holland to demonstrate that a separate unbundling requirement would have the same effects and produce the same roadblocks, disruptions and delays in deployment of broadband in general, and FTTP in particular, as they did under section 251.³

AT&T similarly mischaracterizes the declarations of Mr. Holland by suggesting that Verizon and Mr. Holland have “abandoned” our position and “reverse[d] course” in claiming that “it is not possible, at any cost, for Verizon to comply with section 271 and provide competitive access to FTTP facilities.” AT&T Ex Parte at 3. AT&T similarly submits that Verizon has claimed that it was not “technically possible” to provide competitors with access to the new FTTP network. *Id.* at fn.7. Neither of these claims, however, was made by Verizon. To the contrary, Verizon has stated that, because “[n]ew FTTP networks are neither designed nor built to accommodate access by multiple carriers,” Verizon does not presently know how to unbundle or what would be required. Holland Decl. at ¶ 15; Holland Supp. Decl. ¶ 2. Given this fact, Verizon has also consistently stated – not that it is “not possible” – but that any unbundling requirement would require a costly redesign of the network and associated systems, not only by Verizon but by its equipment suppliers as well. *Id.* Without a real rebuttal to these facts, AT&T creates straw man arguments that are not part of Verizon’s demonstration of harm.

AT&T next attempts to discredit Mr. Holland’s explanation of the costs and burdens that would be associated with forced unbundling of FTTP by claiming that Mr. Holland (i) does not have any basis to know what the actual costs of compliance would in fact be; (ii) has not studied or attempted to quantify these costs; and (iii) has not compared these costs to Verizon’s capital

² AT&T also restates its extraordinary argument that the Commission may *never* forbear from any section 271 checklist requirements and that even if it could, Verizon has not shown that those requirements have been fully implemented. AT&T Ex Parte at 2. Verizon has addressed and refuted these arguments on several previous occasions and respectfully refers the Commission to the prior submissions. See, e.g. Verizon Reply Comments, *Petition for Forbearance of the Verizon Telephone Companies*, CC Docket No. 01-338 (filed Nov. 26, 2003); Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 01-337, et al. (filed March 19, 2004).

³ See Declaration of Jerome Holland, Vice President, Fiber Network Service for Verizon Network Services (“Holland Decl.”), attached to Letter from Ann D. Berkowitz, Verizon, to Marlene H. Dortch, FCC, CC Docket No. 01-337, et al. (filed March 29, 2004); Supplemental Declaration of Jerome Holland, Vice President, Fiber Network Service for Verizon Network Services (“Holland Supp. Decl.”), attached to Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338, et al. (filed May 19, 2004).

expenditure or revenue for long distance. AT&T Ex Parte at 4. As an initial matter, AT&T's focus on monetary costs alone ignores the broader basis upon which the Commission determined not to require unbundling of broadband elements pursuant to section 251 in the *Triennial Review Order*. There, the Commission did not decline to require unbundling solely because it might have been *expensive* for Verizon or other ILECs to do so. Rather, the Commission determined that unbundling was not required both because it was not necessary but, as set forth above, also because imposing unbundling obligations was affirmatively harmful in that it would *discourage investment in and deployment of* broadband facilities and services by ILECs and CLECs alike.⁴ It concluded that unbundling requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology" and observed that "incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment." *Triennial Review Order* ¶¶ 3, 272.

To be sure, the fact that imposing an unbundling obligation would add substantially to the cost of deploying broadband facilities contributes to this disincentive effect. Indeed, higher costs translate into higher prices to consumers, adding further uncertainty to demand for innovative new services and further increasing the risk of an initial deployment. This is further compromised by the fact that imposing an unbundling obligation increases the operational complexity and decreases the efficiency of these new facilities, also a critical consideration since operational efficiency is an important consideration in the decision to invest these facilities to begin with. And, of course, imposing an unbundling obligation further undermines the prospect that companies making risky broadband investments will be able to profit if those investments succeed and, again, increases further the risks of making new investments.

The disincentives to investment and timely and widespread deployment of broadband infrastructure apply with equal force to required unbundling under section 271. As Mr. Holland explained, those disincentives include not only the increased costs of operational problems associated with deploying facilities, but also the host of administrative and regulatory problems that accompany unbundling. Holland Decl. ¶ 2. Because of the "enormous expense and complexity of deploying FTTP" and its "massive upfront investment and risk," these costs and uncertainties would have an "investment-chilling" effect on FTTP deployment. Holland Decl. ¶¶ 12, 14. Specifically, an unbundling requirement under section 271 would:

1. *Dramatically increase the cost of deployment.* As stated earlier, consistent with the *Triennial Review Order's* conclusions that unbundling would not be required, the FTTP network was designed optimally and efficiently and does not accommodate intermediate points of

⁴ See *Triennial Review Order* ¶ 288 (imposing unbundling obligations "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities"); Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-337, et al., attachment at 5 (filed March 26, 2004) ("Verizon March 26 Ex Parte").

interconnection. Thus, if Verizon were required to unbundle the FTTP network, it would have to redesign the entire FTTP network and its associated support systems. Holland Decl. ¶ 15. And while Mr. Holland affirmatively states that the actual costs of unbundling would be difficult to predict at this time⁵ – in part because no one knows how unbundling requirements would apply in this context or how they could be satisfied – previous experience makes it abundantly clear that the costs would be substantial for an already risky investment and that those costs will have a significant impact on the investment decision and deployment plans. *Id.*

In addition to alterations to the network itself, forced unbundling of the FTTP network would also require changes to the development and deployment of the Operations Support System (“OSS”). As Mr. Holland stated, OSSs are essential to providing services as efficiently and at as high a quality as possible to customers and comprise a major cost component of deploying these networks. Holland Decl. ¶ 17. Of the approximately \$1 billion being spent in 2004 for FTTP deployment, more than *ten percent* (approximately \$120 million) is budgeted for the development of OSS to support FTTP. Holland Decl. ¶ 16. And because FTTP is itself a new system, Verizon is designing and building *entirely new systems* to support FTTP deployment with enhanced service capabilities, such as the ability for customers to order FTTP or change their bandwidth in “real time” (i.e. almost instantaneously) via website or calling a Verizon customer representative. *Id.* Verizon has *already* spent hundreds of millions of dollars to modify the different systems that are used for the narrowband network and facilities in order to accommodate unbundling. *Id.* ¶ 18. Imposing an unbundling obligation for FTTP would thus require Verizon to now redesign and modify the new systems that will be used in connection with its FTTP network, and incur the costs all over again that it previously incurred for its narrowband systems in order to support the provisioning, billing, order-processing, maintenance and other functions for multiple providers of this new system. *Id.* Moreover, diverting resources to developing and implementing any unbundling requirements that might be imposed necessarily would ultimately delay the deployment of broadband facilities on a widespread basis. Mr. Holland has estimated that such unbundling requirements would set back Verizon’s FTTP deployment by a year or more. *Id.* ¶ 15.

⁵ AT&T claims that without a study to quantify these costs or some undefined comparison to long distance capital expenditures or revenues, there could be no basis for concluding that the costs of unbundling would be significant. See AT&T Ex Parte at 4. Putting aside the lack of any requirement to conduct such cost study or comparison, these arguments only highlight AT&T’s dogged refusal to accept economic realities. Cf. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 429 (1999)(Breyer, J., concurring in relevant part, dissenting on other grounds) (“Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. The more complex the facilities, the more central their relation to the firm’s managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious”).

As Mr. Holland noted, the costs and burdens of unbundling do not simply stop at network design. Verizon's experience in the context of its section 251 unbundling obligations for narrowband networks demonstrates that any unbundling obligation can be expected to generate additional costs and uncertainties from evolving regulations and litigation resulting from the "tangled management inherent in shared use of a common resource."⁶ Indeed, the D.C. Circuit recognized that "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *USTA I*, 290 F.3d at 427. For example, these evolving costs and uncertainties include the inevitable litigations over the scope, interpretation and application of the unbundling requirements⁷ that could lead to millions of dollars of modifications to the network, regardless of whether CLECs realistically planned to or actually use the unbundled facilities. See Holland Decl. ¶¶ 20-21. Further litigation can be expected too in determining the pricing for section 271-only elements, generating even more cost and delay. *Id.* ¶ 23.

2. *Increase the structural complexity and undermine the efficiencies that are critical to the FTTP investment.* In his declaration, Mr. Holland explained that the FTTP network is an integrated fiber network that uses passive optical network ("PON") technology to provide a seamless connection between the central office to a customer's premises. Thus, unlike existing narrowband-based networks, FTTP loops cannot be split into discrete elements, such as loops, subloops and separate network interface devices, with discrete pre-existing access points. See Holland Decl. ¶ 15. Moreover, the passive nature of the PON technology eliminates expensive electronics between the central office and the customer location and consequently the expensive labor-intensive field operations needed to enable or reconfigure connectivity to a customer or maintenance and repair dispatches. Indeed, these efficiencies help drive FTTP investment and deployment. *Id.* This architecture was designed to be the most efficient and optimal design for Verizon's "massive upfront investment and risk." Holland Decl. ¶¶ 12, 15. If Verizon were forced to unbundle, Verizon would need to incorporate more electronics that would disturb the passive nature of the network, equip the network with unneeded excess capacity to anticipate the possibility that multiple carriers would seek to interconnect, and would need to redesign and build supporting OSS systems to provide and manage access by multiple carriers. See Holland Decl. ¶¶ 15, 18, 21. These changes would result in a loss of many of the efficiencies that provide the basis for the investment risk.

3. *Inject additional regulations and uncertainties into FTTP deployment.* Unbundling obligations would further undermine investment incentives by subjecting Verizon to a shifting range of regulatory requirements. Imposing unbundling obligations under section 271 would result in different regulatory regimes for former Bell companies than for others and, in Verizon's

⁶ *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("USTA I").

⁷ As Verizon noted, AT&T's proffered speculation on how to define what constitutes an unbundled FTTP loop and ATM switch is but just one example of the types of issues and disputes that will inevitably take place in determining what and how to unbundle. Holland Supp. Decl. ¶ 4.

case, different obligations for former Bell Atlantic service areas compared to former GTE service areas. These disparate regulatory regimes would defeat efforts to employ common facilities, systems and practices and significantly undermine efforts to deploy broadband network facilities in the most efficient and lowest cost manner. In addition to disparate federal requirements and although any obligation under section 271 is clearly a federal issue, CLECs have argued (and some states have agreed) that states have a right to regulate pricing of 271 elements and at TELRIC rates.⁸ The uncertainty and complexities surrounding separate state regulatory treatment and pricing of FTTP will further serve to discourage deployment.

For all of the reasons stated in Verizon's prior submissions, unbundling obligations under section 271 would inject additional costs, complexities and regulatory uncertainties into an already risky undertaking by Verizon to deploy FTTP. Since the Commission correctly determined that these investment disincentives were sufficient reason to refrain from imposing unbundling obligations under section 251, it should likewise forbear from any separate unbundling obligation for broadband under section 271.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Dee May".

cc: P. Arluk
M. Carey
T. Navin
S. Bergmann
M. Brill
D. Gonzalez
C. Libertelli
J. Rosenworcel

⁸ See Holland Decl. ¶ 22; Verizon March 26 Ex Parte, attachment at 32 and fn. 54; Letter from Dee May, Verizon, to Marlene H. Dortch, FCC, CC Docket Nos. 01-338, et al. (filed July 27, 2004).